

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

HERMAN ROSENWASSER, an individual doing business
under the firm name and style of PERFECT GARMENT
COMPANY,

Appellee.

Amended and Supplemental Jurisdictional Statement
and
Points and Authorities
in
Opposition to Motion of Appellee to Dismiss.

CHARLES H. CARR,
United States Attorney;

JAMES M. CARTER,
Assistant U. S. Attorney;

V. P. LUCAS,
Assistant U. S. Attorney;

United States Postoffice and
Courthouse Bldg., Los Angeles (12),
Attorneys for Appellant.

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CLERK

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No. 10782

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Appellee.

AMENDED AND SUPPLEMENTAL JURISDIC-
TIONAL STATEMENT.

Comes now the United States of America, appellant herein, and files this its amended and supplemental jurisdictional statement and asks that the same be received and filed to correct the jurisdictional statement found on page 3 of appellant's opening brief.

Amended and Supplemental Jurisdictional Statement.

(a) The District Court had jurisdiction under the provisions of Section 41(a) of Title 28 of the United States Code.

(b) Under Section 546 of Title 18 of the United States Code the crime with which defendant was charged is cognizable in the District Court.

(c) This Court has jurisdiction by virtue of the provisions of Section 225(a) of Title 28, United States Code, to review by appeal final decisions in the District Courts.

(d) This Court has jurisdiction under and by virtue of the provisions of Section 225(b) and of Section 227 of Title 28, United States Code, to review upon appeal an interlocutory order or decree of the District Court granting an injunction.

Statute Involved.

The Fair Labor Standards Act of 1938, 29 U. S. C. A. 201 *et seq.*, in its pertinent and applicable parts, provides:

“The Administrator or his designated representatives * * * may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this act. . . .”

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Appellee.

APPELLANT'S POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS THE APPEAL.

Comes now United States of America, appellant herein, and files with the court its points and authorities in opposition to the motion to dismiss the appeal in the above entitled matter.

Appellant respectfully urges that this Honorable Court deny the motion to dismiss the appeal in the above entitled matter, and hear the case on its merits, and as authority for its position, makes the following analysis of appellee's memorandum of points and authorities in support of its motion, and presents the following points and authorities in opposition to the motion.

I.

**Defendant's Motion and Memorandum in Support
Thereof.**

Part A of defendant's memorandum is a preliminary statement which requires no comment.

Appellee in Part B of his memorandum states that the Circuit Court of Appeals has appellate jurisdiction to review only "final decisions." This, of course, is not true since the Circuit Court also has appellate jurisdiction to review certain types of interlocutory orders by virtue of 28 U. S. C. Section 227. This point will be discussed below.

Similarly, appellee is mistaken in the point urged in Part C of his memorandum that the *sentence* is the only final judgment from which an appeal lies in a criminal case. Not only are many types of orders made upon motions to suppress evidence appealable as final orders, as indicated in Part D of appellee's memorandum, but specifically orders quashing, setting aside or sustaining demurrers to an indictment under certain circumstances and orders sustaining a special plea in bar are appealable. 18 U. S. C. 682. It is not contended, of course, that the order here involved is of the types enumerated in that section. The point is simply mentioned for the purpose of demonstrating that appellee's statement that the sentence is the only final judgment from which an appeal lies is not correct.

Part D of appellee's memorandum deals with the appealability of orders made upon motions to suppress and re-

turn evidence. The motion in this case was made by the defendant after the return of the indictment, the situation which is discussed in Section 4 of Part D of appellee's brief. However, it does not follow and the authorities do not hold that, to use appellee's language, "where the motion to suppress the use of evidence in a criminal case is made by the party defendant *after the return of the indictment*, the proceeding is considered interlocutory and not a 'final decision' so that no appeal would lie from such an order. . . ."

In *Cogen v. United States*, 278 U. S. 221, upon which appellee relies, the court while holding the order there involved interlocutory and not appealable clearly recognized that under certain circumstances such an order would be final and appealable. The court said:

"Where an application is filed in that form [by motion in the criminal case], its essential character and the circumstances under which it is made will determine whether it is an independent proceeding or merely a step in the trial of the criminal case." (P. 225.)

We propose to demonstrate that the essential character of the order here involved and the circumstances under which it was made clearly establish that the proceeding became independent and more than merely a step in the trial of the criminal case so that the order is appealable as a final order.

II.

Analysis of Authorities Cited by Appellee.

One of the authorities cited by appellee is that of *Korematsu v. United States*, 319 U. S. 432. This case is of little assistance to the court in considering the present appeal, for the reason that it, like so many other authorities cited by the appellee, has to do with a matter of probation, so whatever is said in the opinion might be considered in the light of the statutes governing probation.

The facts were that the defendant had been ordered out of a defense area in accordance with Executive Order No. 9066, and Proclamation No. 1, issued by General DeWitt, and having disobeyed the order was taken before the United States District Court and found guilty and placed on probation for a term of 5 years without the court imposing any sentence.

The Circuit Court of Appeals for the Ninth Circuit was in doubt as to whether or not it had jurisdiction of the appeal under such circumstances, and certified the question to the United States Supreme Court under Section 239 of the Judicial Code.

The Supreme Court reviewed the decisions of the Circuits as well as some of its own decisions, and answered the question in the affirmative.

The next case cited by appellee, that of *Cobbledick et al. v. United States*, 309 U. S. 323, apparently has more relevancy to matters involved in the present appeal than any of the other authorities cited by the appellee in support of the motion to dismiss the appeal.

This was a case in which certiorari was granted to review the judgment of the Ninth Circuit in a case involving motions to quash subpoena *duces tecum*.

It appears from the record that the United States Grand Jury, in and for the Northern District of California, had

issued subpoenas *duces tecum* addressed to the petitioners to produce documents before the grand jury, and deeming these subpoenas to require the production of evidence which was prejudicial to the rights of petitioners, a motion to quash the petitions was filed in the District Court. Upon the motions being denied, the petitioners sought a review in the Circuit. The Circuit found itself to be without jurisdiction and dismissed the appeals, and the matter was brought before the Supreme Court because of the conflict between the Circuits.

Inasmuch as no appeal lies from the District Court to the Circuit unless there is finality in the judgment or order pronounced by the District Court, no appeal would lie to the Circuit, the Supreme Court of necessity had to discuss what was and what was not a final order.

After reviewing the policy of the law with respect to appeals, the opinion stated:

“In a certain sense finality can be asserted of the orders under review, so, in a certain sense, finality can be asserted of any order of a court. And such an order may coerce a witness, leaving to him no alternative but to obey or be punished. It may have the effect and the same characteristics of finality as the orders under review, but from such a ruling it will not be contended there is an appeal.”

The above is a quotation from the case of *Alexander v. United States*, 201 U. S. 117, and the basis for the holding is, as said by the court, that to allow an appeal under such circumstances would halt the orderly progress of a cause and consider incidentally a question which has happened to cross the path of such litigation.

The opinion goes on to say that adequate protection is afforded if the person refuses to obey the order and the

court punishes for contempt, then the judgment becomes personal to the witness and he may have his appeal.

The court also analyzed in the *Cobbledick* case its ruling in *Perlman v. United States*, 247 U. S. 7, in which certain exhibits owned by Perlman had been impounded in court during a patent suit, and the United States Attorney had attempted to have these exhibits produced before the grand jury, and Perlman had petitioned the District Court to prohibit their use invoking his constitutional privilege of not giving evidence against himself, and when the petition was denied Perlman sought a review by the Supreme Court and the United States Attorney claimed that no appeal would lie because the action of the District Court was not final, but interlocutory. In holding that it was a final order, the court said that if the production of the documents were allowed, Perlman's constitutional rights would be then invaded and he could only protect himself by separate proceeding to prohibit their forbidden use, and the District Court's order was, under the circumstances, final.

The great distinguishing feature pointed out in the *Cobbledick* case is, however, that different rules must be promulgated under different sections, and then point out there is one class of cases dealing with the duty of witnesses to testify which prevents differentiating different circumstances and refer to those cases arising under paragraph 12 of the Interstate Commerce Act, whereby statutory proceedings may be brought in the District Court to compel testimony from persons who have refused to make disclosures before the Interstate Commerce Commission. In these cases the orders of the District Court directing the witness to answer have been held final and reviewable. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447; *Harriman v. Interstate Commerce Commission*, 211

U. S. 407; *Ellis v. Interstate Commerce Commission*, 237 U. S. 434.

The significant thing about the *Cobbledick* case is that the court distinctly points out that differences as well as resemblances must be taken into consideration in applying a ruling to each set of facts. In other words, the court is at great pains to say that not every case can be determined by merely seeking out some prior decision which has some resemblance to the facts in the case to be decided, and holding that the resemblance compels a ruling identical with the prior holding, and it is this point which appellant has attempted to emphasize in the present appeal.

The *Cobbledick* case said as follows:

“Such cases were actually considered in the Alexander case, and deemed to rest ‘on statutory provisions which do not apply to the proceedings at bar, and, while there may be resemblances to the latter, there are also differences.’ The differences were thought controlling. Appeal from an order under Sec. 12 was again here in the Ellis case *supra*, fully argued in the brief, and again differentiated from a situation like that in the Alexander case. ‘No doubt’ was felt that an appeal lay from the district Court’s direction to testify.”

The next case, that of *Miller v. Aderhold*, 288 U. S. 206, involved the question of the rights of a petitioner who had been placed on probation. The petitioner was convicted upon his plea of guilty of the crime of stealing from the United States Mails, and by order of the court sentence was suspended and he was discharged from custody of the Marshal. Thereafter, the petitioner was sentenced by another judgment to 4 years in prison. A mo-

tion to vacate that judgment was denied, and a petition for a writ of habeas corpus was filed in the Federal District Court of Georgia, that being the place of the prisoner's confinement.

A careful reading of this case discloses nothing which would be of assistance to this court in determining the appeal or the motion now before the court.

The next case cited by the appellee in his motion to dismiss is that of *Hill v. United States ex rel. Wampler*, 298 U. S. 460.

This case also is one in which certain questions were certified to the United States Supreme Court by the Third Circuit, and involved questions of habeas corpus. It throws little, if any, light upon the question now before the court.

The facts in the case, as disclosed by the opinion, are that the petitioner, Wampler, was convicted in the United States District Court for the District of Maryland, and judgment was pronounced. That he paid a fine of \$5,000.00, and 18 months in the penitentiary on each count of the indictment, said terms of imprisonment to be computed as beginning on a certain day and the fines to be cumulative and the terms of imprisonment to run concurrently.

In writing up the judgment as pronounced by the court, the clerk made somewhat of a variance and the result was that the commitment was broader than the judgment pronounced by the court.

Three questions were propounded to the United States Supreme Court, and the answers to the three questions in no way would enlighten this court in its consideration of the present appeal.

III.

The Order Is Appealable as a Final Order.

The general rule is that a plenary action is the proper procedure by which to recover property to which a party has the immediate right of possession. Ordinarily the proper action is replevin or its modern counterpart, claim and delivery. 54 Corp. Jur. (Replevin, Sec. 1 *et seq.*) 417; *Fredericks v. Tracy*, 98 Cal. 658.

Prior to *Weeks v. United States*, 232 U. S. 383, property held by prosecuting authorities for use as evidence in the prosecution of a criminal case could not be recovered by the person claiming the right to its immediate possession.

8 Wigmore on Evidence (3rd ed. 1940), Sec. 2183, 2184.

46 Am. Jur. (Replevin, §46) 30.

The *Weeks* case established the rule that if property was seized in violation of the Fourth or Fifth Amendments to the Constitution solely for the purpose of being used as evidence in a criminal case it might be recovered either by timely motion in the criminal case or by a summary proceeding against the holder of the property, rather than by an independent action.

It is obvious that in these exceptions countenanced by the *Weeks* case the court does not purport to try title to or right to possession of the property. It simply exercises jurisdiction over its officers by directing them to return the property which because of the manner in which it was seized may not be used for the only purpose for

which it was seized, to wit, as evidence in the criminal case. See *Maresca v. United States*, 266 Fed. 713.

Where the property has not been seized solely for use as evidence in the prosecution of a criminal case an order which in addition to suppressing the use of the evidence in that case directs its return goes further than is justified by the theory of the *Weeks* case and the proceeding is thereby converted into an independent proceeding, the purpose of which is to try title or the right to possession of the property. Such an order, affecting as it does the rights of the parties to the possession of the property independently of its use as evidence in the criminal case, must be deemed a final order and therefore appealable. Cf. *Red Star Laboratories v. Pabst*, 100 F. (2d) 1 (CCA 7); *Hildebrand v. Superior Court*, 173 Cal. 86; *Anglo-California Bank v. Superior Court*, 153 Cal. 753.

Applying these principles to the facts involved herein it is clear that the order did more than direct the return of property which had been illegally seized solely for use as evidence in a criminal case. There is no evidence at all that that was the purpose of the seizure. On the contrary, from the facts stated in the appellee's affidavit in support of his motion to suppress the evidence it is apparent that the officers of the Wage-Hour and Public Contracts Divisions of the United States Department of Labor secured the evidence during the course of an investi-

gation being conducted by them in accordance with Section 11(a) of the Fair Labor Standards Act of 1938.¹

A second basis for holding that the order in question was final and therefore appealable is that it affected the rights of parties who are not party to the litigation. The Supreme Court recognizes that orders which affect the rights of other parties are not interlocutory.

In *Cogen v. United States*, 278 U. S. 221, the court said:

“The orders made upon such applications [motion to suppress evidence made in the course of the criminal prosecution so far as they affect the rights only of parties to the litigation, are interlocutory.” [p. 224.]
(Underscoring added.)

The order in the instant case, even had it been confined solely to the evidence to which the motion was directed, would have affected the rights of parties who are not involved in the litigation. The motion [R. p. 32] was for an order directing that plaintiff's exhibits and exhibits for identification in Case No. 16152, entitled *United*

¹C. 676, 52 Stat. 1060, 29 U. S. C. Sec. 211(a):

“The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. . . .”

States of America v. Herman Rosenwasser, which is a different case from that in which the motion in question was made, be suppressed and excluded as evidence in the trial of the instant case. Note that the motion did not ask, as indeed it could not properly ask, for the return of that evidence. It is clear that these exhibits and exhibits for identification were at the time of the motion in the custody and possession of the Clerk of the District Court of the United States. Insofar as the order directed the return of this property it dealt with the right of possession of the clerk who is not a party to the action and therefore the proceeding became independent in character and the order a final one from which an appeal lies.

See *United States v. Marquette*, 270 Fed. 214 (CCA, 9), in which this court by the following language indicated that under such circumstances an order would be final and appealable:

“The court below did not assume jurisdiction for the purpose of trying title or right of possession, but simply to prevent the use of the property wrongfully seized as evidence upon the trial of the criminal charge, and the order directing the return of the property to avoid that result is no more final or appealable than would be any other order excluding testimony on the trial.”

In going beyond the scope of the relief requested by appellee's motion to suppress evidence the order substantially affected the rights of still other parties to the pos-

session of property which was not the subject of appellee's motion. The order directed the officers and agents of the U. S. Department of Labor, Wage and Hour Division "and/or any other person obtaining information or data" from the documents to return the same forthwith to the defendant.

It is well settled that the fact that the "United States" is a party to the action does not give the court jurisdiction over the officers and employees of the Wage and Hour Division or power to make an order directing the return of property in their possession or to which they have the right to possession." *Applybe v. United States*, 32 F.(2d) 873 (CCA 9).

United States v. Gowen, 40 F.(2d) 593 (CCA 2) reversed upon a different interpretation of the facts in *Go-Bart Co. v. United States*, 282 U. S. 344.

In re Weinstein, 271 Fed. 5, affirmed as *Weinstein v. Attorney General*, 271 Fed. 673 (CCA 2).

Therefore, when the court purported to adjudicate the right of possession to property as between appellee and officers and agents of the Wage-Hour Division, U. S. Department of Labor, it converted the proceeding into an independent proceeding and its order was final and appealable. Cf. *Cogen v. United States*, 278 U. S. 221; *United States v. Marquette*, 270 Fed. 214 (CCA 9), *supra*.

Finally the court achieved the same result and made its order a final one in an independent proceeding by restraining the United States and its officers and agents, from using the property in question "in any proceeding of any kind or character whatsoever against this defendant."

The Supreme Court in the *Cogen* case clearly indicated that the order therein considered was deemed interlocutory because it dealt with the question of suppressing the evidence as an integral part of and not distinct from the general litigation. The court said:

"In essence the motion resembles others made before or during the trial to secure or to suppress evidence, such as applications to suppress a deposition . . . ; to compel the production of books or documents . . . ; for leave to make physical examination of plaintiff . . . ; or for a subpoena duces tecum The orders made upon such applications so far as they affect parties to the litigation are interlocutory."

This theory had already been recognized by this court in the *Marquette* case when it held the order there before it interlocutory because the court assumed jurisdiction "merely to prevent the use of the property wrongfully seized as evidence upon the trial of the criminal charge." Here, as has been indicated, the court went much further and purported to prevent the use of the evidence "in any proceeding of any kind or character whatsoever against this defendant."

IV.

The Order Is Appealable as an Interlocutory Order.

Having demonstrated that the order is not simply only for the suppression and return of evidence as an incident to the prosecution of the criminal case but is independent and therefore final and appealable, appellant will also demonstrate that that portion of the order which enjoins the United States of America, its officers and agents, from using any of the property in question in any proceeding of any kind or character whatsoever² is appealable as an interlocutory order in accordance with 28 U. S. C. Sec. 227.

28 U. S. C. Sec. 227 provides, insofar as material here:

“Where, upon a hearing in a District Court, or by a judge thereof, in vacation, an injunction is granted . . . by an interlocutory order or decree . . . an appeal may be taken from such interlocutory order or decree to the Circuit Court of Appeals; . . .”

Prior to 1925 this section applied only to appeals from the orders therein mentioned made upon a hearing *in equity*. The amendment of that year deleted the words “in equity” and it has been held that to be appealable under this section the order need not be one made in a “hearing in equity.” *Morgan v. Kroger Grocery & Baking Co.*, 96 F.(2d) 470 (CCA 8, 1938).

²The order in its entirety is found in the Transcript of Record, pp. 39-40 and the injunctive portion thereof reads as follows:

“. . . and the United States of America, and/or its officers and agents are barred from using any such invoices, bills, records, data or information or, any matter obtained therefrom directly or indirectly in any proceeding of any kind or character whatsoever against this defendant; and, . . .”

This court held the section applicable to an appeal from an interlocutory injunction granted in an action at law for damages and it is respectfully urged that under that holding the order in this case is appealable under Section 227. *Albi v. Street & Smith Publications*, 140 F.(2d) 311 (CCA 9). In that case Albi filed suit in the State Court for recovery of damages based upon an alleged libelous publication and the two defendant publishing companies filed a motion in the State Court for the removal of the cause to the Federal Court on the ground that there was a separable controversy as to the non-resident defendants. This motion to transfer the cause to the Federal Court was granted and thereafter the plaintiff filed a motion in the Federal Court to remand the cause back to the State Court. This motion was denied and as a part of the order denying the motion to remand the Federal Court enjoined further prosecution of the cause in the State Court. This court in a footnote to its opinion stated as follows:

“Insofar as the order enjoins further prosecution of the cause in the State Court it is appealable under Section 129 of the Judicial Code 28 U. S. C. A. Sec. 227. See *Borden Co. v. Zumwalt*, 9 Cir., 120 F.(2d) 69, and authorities there cited.”

Having shown that the order appealed from is appealable as a final order under 28 U. S. C. Sec. 225 because it is not merely an order suppressing and directing the return of evidence as an incident to the criminal prosecution but is independent of that prosecution in that it purported to dispose of property which had not been seized simply for use in a criminal prosecution; in that it

purported to try the right of possession to the property as against the Clerk of the District Court and as against officers and agents of the Wage-Hour Division, U. S. Department of Labor, none of whom were parties to the litigation, and in that it purported to enjoin the use of the property not only in the criminal prosecution but in any proceeding of any kind whatsoever; and having also shown that the injunctive portion of the order is an appealable order under 28 U. S. C. Sec. 227, appellant respectfully urges this court to deny the motion to dismiss the appeal and to hear the appeal on its merits.

Respectfully submitted,

CHARLES H. CARR,

United States Attorney;

JAMES M. CARTER,

Assistant U. S. Attorney;

V. P. LUCAS,

Assistant U. S. Attorney;

Attorneys for Appellant.

